TUPE Reforms – draft amendments to regulations published

The Government has published draft Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013, following a consultation on proposed changes to TUPE.

The Government intends to lay the draft before Parliament in December 2013 so that the amendments may come into force very soon in January 2014.

The draft amendments do not remove the rules on service provision changes and therefore are far less significant than initially expected (see our previous update on changes to TUPE here). They do however, provide greater certainty as to what qualifies as a service provision change.

Broadly, the draft regulations propose the following amendments:

- **Service Provision Changes**: in order to bring the TUPE regulations in line with case law, they provide that for a service provision change to be triggered, the activities carried on after the change must be “fundamentally the same as the activities carried out previously”;

- **Pre-transfer Consultation by Transferee**: a couple of new provisions have been introduced in the Trade Union and Labour Relations (Consolidation) Act 1992 which allow a transferee to begin consultation before any TUPE transfer in relation to employees who are likely to be made redundant after the transfer. There are certain conditions to this – the transferor must agree to this beforehand and a written notice must be given by the transferee to the transferor. It will be interesting to see how co-operative a transferor will be pre-transfer in allowing a transferee access to the workforce for consultation purposes;

- **Variation of Contracts**: the amendments permit the ability to vary contracts (a) where there is an economic, technical or organisational (ETO) reason entailing changes in the workforce, or (b) where the terms of the contract permit variation. Further, the restriction on varying contracts will not apply to terms which are incorporated from a collective agreement provided that the variation takes place more than one year after the transfer and the terms are no less favourable “when considered together”;

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• **Change of Location**: a change in the place of work following a transfer will now be included within the term “changes in the workforce” for the purposes of an ETO reason. Therefore, genuine place of work related redundancies will no longer be automatically unfair;

• **Collective Agreement**: where a collective agreement, which is incorporated into an employee’s contract, is amended or agreed post-transfer, the terms agreed post-transfer shall not bind such employee. This codifies what is known as the “static” approach by reflecting the ECJ’s decision in *Alemo-Herron & Ors v Parkwood Leisure Ltd [2013] C-426/11*;

• **Time period for Employee Liability Information**: the time period for notification of employee liability information by the transferor to the transferee has been increased from 14 to 28 days before the transfer, to ensure that the transferor does not use this as a tactical tool to disadvantage a transferee;

• **Micro-businesses**: organisations with fewer than 10 employees will discharge their obligation to carry out collective consultation by instead conducting appropriate individual consultation. It is disappointing that this carve-out applies only to micro-businesses and not SME’s as the bureaucratic nature of pre-transfer consultations adds significantly to the costs of small businesses.

Further guidance is likely to be issued before the draft amendments come into force. While the draft amendments do not deliver on what was promised, they do help in providing greater flexibility to employers when dealing with TUPE.

The draft regulations can be viewed [here](#).

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